

John L. Malesovas  
State Bar No. 12857300  
Malesovas Law Firm  
816 Congress Avenue, Suite 1265  
Austin, Texas 78701  
Telephone: (512) 708-1777  
Facsimile: (512) 708-1779  
E-mail: [john@malesovas.com](mailto:john@malesovas.com)

Anthony L. Vitullo  
State Bar No. 20595500  
Laura Richards Sherry  
State Bar No. 24056203  
FEE, SMITH, SHARP & VITULLO, L.L.P.  
Three Galleria Tower  
13155 Noel Road, Suite 1000  
Dallas, Texas 75240  
Telephone: (972) 934-9100  
Facsimile: (972) 934-9200  
E-mail: [lvitullo@feesmith.com](mailto:lvitullo@feesmith.com)  
[lsberry@feesmith.com](mailto:lsberry@feesmith.com)

Larry E. Kelly  
BEARD KULTGEN BROPHY BOSTWICK DICKSON & SQUIRES, LLP  
5400 Bosque Boulevard, Suite 301  
Waco, Texas 76710  
Telephone: (254) 776-5500  
Facsimile: (254) 776-3591  
E-mail: [Kelly@thetexasfirm.com](mailto:Kelly@thetexasfirm.com)

*Counsel for Movants*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**IN RE:**

**MILLENNIUM MULTIPLE  
EMPLOYER WELFARE BENEFIT  
PLAN,**

**DEBTOR.**

---

**CLAUDE YOUNG, et al,  
*Plaintiffs,***

**v.**

**THE MILLENNIUM MULTIPLE  
EMPLOYER WELFARE BENEFIT  
PLAN, et al  
*Defendants.***

**CASE NO. 10-13528**

**(CHAPTER 11 - PENDING IN THE  
UNITED STATES BANKRUPTCY  
COURT FOR THE WESTERN  
DISTRICT OF OKLAHOMA)**

**ADVERSARY NO. 10-03156-bjh**

**MOTION TO CLARIFY SCOPE OF REMOVAL, ALTERNATIVELY, MOTION TO REMAND, MOTION TO ABSTAIN AND RESPONSE TO MOTION TO TRANSFER VENUE AND BRIEF IN SUPPORT  
FILED BY COTTAM AND WARDER**

COME NOW John Cottam, Linda Cottam, their company, Lincom, LLC, and their former employee, Kevin Barba (“Cottam”); Ronald Scot Warder, Candace Warder, and E.S. and D. Services, Inc. (“Warder”) (Cottam and Warder hereinafter jointly referred to as “Movants”) and respectfully move this Court to clarify the scope of the removal in this action, or alternatively remand their claims, to the extent they have even been removed, to the 95<sup>th</sup> District Court of Dallas County, Texas, or alternatively abstain from considering their claims and remand the same and to also Deny Debtors’ Motion to Transfer Venue of their claims to Oklahoma showing the following:

**A. History of Litigation**

1. Movants are Plaintiffs in a suit that was originally filed against multiple Defendants in the 95<sup>th</sup> Judicial District Court of Dallas County, Texas on May 2, 2008 (“State Court Lawsuit”).
2. On June 9, 2010, Debtor filed a Petition for Relief under Chapter 11 of Title 11, United States Code.
3. On June 9, 2010, Debtor also filed a Notice of Removal purporting to remove certain causes of action to this Court pursuant to 11 U.S.C. § 1452.
4. On June 10, 2010, Debtor filed a Motion to transfer the removed causes of action to the Western District of Oklahoma.

## **B. Movants' Claims in the Lawsuit**

5. The Millennium Multiple Employer Welfare Benefit Plan ("Debtor") purports to be a multiple employer welfare benefit plan, although Judge Molberg granted Plaintiffs' Motion for Partial Summary Judgment in the Lawsuit and found that Debtor is not a valid multiple employer welfare benefit plan under ERISA as a matter of law. Exhibit 1. Judge Ginsburg, Judge of the 193<sup>rd</sup> District Court of Dallas County, Texas likewise ruled the same way in a case that was filed against Debtor and ultimately settled for a substantial sum during the third week of trial. Exhibit 2.

6. Although Debtor is a named Defendant in the Lawsuit, Movants assert no claims against the Debtor in the Lawsuit.

7. Debtor purports to be controlled by a Plan Committee, currently chaired by a non-voting, non-participant in the Debtor Plan named Jon Cocks. The Plan Committee is made up of three Plan Participants (even though the Master Plan which purports to be the formation document for Debtor requires a minimum of five voting members to constitute a valid Plan Committee), each of whom has one vote, although only two of these voting members actively participate. It was only these two active plan committee members that voted to give Cocks the purported authority to file the Petition for Relief under Chapter 11.

8. The only assets of the Plan are life insurance policies, with significant cash values, on the lives of the participants who all contributed 100% of the funds, through their small businesses, that were used to purchase these policies. The Plan purports to have a Trustee, Republic Bank & Trust, and a third party administrator, SecurePlan

MOTION TO CLARIFY SCOPE OF REMOVAL, ALTERNATIVELY, MOTION TO REMAND,  
MOTION TO ABSTAIN AND RESPONSE TO MOTION TO TRANSFER VENUE  
AND BRIEF IN SUPPORT FILED BY COTTAM AND WARDER

PAGE 3 OF 13

Administrators, LLC (a wholly owned subsidiary of Republic organized for the sole purpose of acting as the TPA of the Debtor Plan).

9. Although Cocks, the Plan Committee members, the Trustee and the TPA are all also named as Defendants in the Lawsuit, Movants make no claim against them either.

### **C. Motion to Clarify Scope of Removal**

10. The bankruptcy removal statute upon which Debtor relies, 28 USC 1452, provides for limited removal of only “any claim or cause of action in a civil action”. It does not provide for removal of the entire “civil action” as 28 USC 1441 provides. (“[A]ny civil action brought in a State court … may be removed ....” 28 USC 1441.) In addition, only the claims or causes of action over which the federal court has jurisdiction under 28 USC 1334 may be removed. Further, the scope of the removal is generally determined by reference to the Removal Petition. *In Re Princess Louise Corp.*, 77 B.R. 766, 768 (C.D. Cal. 1987). Any ambiguity in the scope of removal should be construed in favor of a narrow removal given the limited nature of removal jurisdiction under 28 USC § 1452, and the fact that federal removal jurisdiction is to be narrowly applied. “Any ambiguities are construed against removal because the removal statute should be strictly construed ....” *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5<sup>th</sup> Cir. 2002).

11. In the Notice of Removal, Debtor references claims made against it by Plaintiffs in the state court lawsuit and characterizes these claims as “the Lawsuit”. Debtor deliberately sets forth the identity of each person Debtor asserts to be making a claim against it in the Lawsuit. Debtor then states that it is removing “the Lawsuit”. Debtor does not reference the *many and multiple claims* made by Plaintiffs against *many and* MOTION TO CLARIFY SCOPE OF REMOVAL, ALTERNATIVELY, MOTION TO REMAND, MOTION TO ABSTAIN AND RESPONSE TO MOTION TO TRANSFER VENUE AND BRIEF IN SUPPORT FILED BY COTTAM AND WARDER

*multiple other parties* to the so-called “Lawsuit.” So it appears from the Notice of Removal that Debtor has only removed the claims and causes of action asserted against it – which are the only claims or causes of action that it is even permitted to remove. And, any ambiguity in the Notice of Removal must be construed to narrow the scope of removal, which in this case would limit the removal to claims asserted against Debtor.

12. Cottam and Warder have filed a stipulation in the Lawsuit wherein they “stipulate and agree that John Cottam, Linda Cottam, Kevin Barba, Lincom LLC, ... Candace Warder, Ronald Warder (and their employer ES&D) are not seeking appointment of a receiver nor are they asserting claims against the Plan, Jon Cocks, the committeemen the trustee or the TPA.” Stipulation, Exhibit 3. Since Movants are making no claim against Debtor, their claims have not been removed.

13. Alternatively, even if the claims and causes of action against non-debtors were arguably removed, any attempt to remove claims or causes of action, other than those against the Debtor, is a nullity. “In fact, the removal by [the Debtor] can in no way hinder, delay or stay the state court proceeding as far as other non-debtor entities and persons are concerned.” *In re Wellington Resources Corp.*, 20 B.R. 64, 26 (1982).

14. Movants therefore request this Court to clarify the scope of removal and enter an order confirming that none of Movants’ claims or causes of action have been removed.

#### **D. Motion to Remand**

15. Alternatively, if Movants claims and causes of action have been removed, they hereby move for remand of same.

16. Removal under 28 USC 1452 is limited to removal of claims or causes of action that are "related to" a bankruptcy case. A matter is "related to" a bankruptcy proceeding if the outcome of the matter could conceivably have any effect on the estate being administered in bankruptcy. *In re Wood, 825 F.2d 90, 93 (5th Cir. 1987)*. Since Movants claims could have absolutely no effect on the Debtor's estate, they are not "related to" a bankruptcy proceeding and cannot be removed.

17. For these reasons, to the extent that Debtor has purported to have removed Movants' claims, this Court lacks subject matter jurisdiction as Movants make no claim against Debtor, the assets of Debtor or any party related to Debtor (Cocks, Plan Committee members, Trustee or TPA). Thus, to the extent that Debtor has actually removed Movants' claims to this Court, this Court lacks subject matter jurisdiction over Movants' claims and they should be remanded to state court. Movants accordingly move for remand to the extent that their claims have even been removed.

#### **E. Motion to Abstain**

18. Alternatively, Movants move the Court to abstain from adjudicating their claims in any manner, and move for remand under 28 USC 1334(c)(2) because Movants claims against third-parties are based on state law, do not arise under Title 11, could not have been originally commenced in Federal Court and can be timely adjudicated in the state court where it was pending and set for trial as noted above. *In re: Southmark Corp.*, 163 F.3d 925 (5th Cir. 1999). The Lawsuit is set for trial on September 29, 2010 (Exhibit 4, ¶ 1), there is a status conference set for July 26, 2010 in the Lawsuit (Exhibit 4, ¶ 1),

Movants have designated their experts and provided reports from their experts and their cases will be ready to go to trial on the date set.

19. Alternatively, Movants move the Court to abstain from adjudicating their claims in any manner, and move for remand for equitable reasons pursuant to 28 USC 1452(b) for the reasons noted above. Movants' claims arise exclusively under Texas state law. Judge Molberg has already spent considerable time presiding over numerous pretrial matters in this case and the related *Westfall* case and has adopted a comprehensive pretrial schedule that is substantially complete. Exhibit 4. Numerous equitable grounds call for a remand of this case. *McCratic v. Bristol-Myers Squibb & Co.*, 183 B.R. 113 (N.D. Tex. 1995).

20. In support of abstention, Movants also incorporate herein the Motion to Remand simultaneously filed by the other Plaintiffs in the underlying state court case who actually are seeking relief against Debtor

#### **F. Opposition to Motion to Transfer Venue**

21. This Court should promptly rule on this Motion to Remand or alternatively, Motion to Abstain rather than transfer this to Oklahoma as there is no basis for transferring Movants' claims to Oklahoma. *See W.S.F.-World Sports Fans, LLC v. Quest Title Company*, 367 B.R. 786, 791 (Bankr. D.N.M. 2007) ("[w]hen a proceeding has been removed to the bankruptcy court, and the party who removed the proceeding seeks to transfer venue while the opposing party seeks abstention and remand, the Court should first consider whether to abstain and remand before addressing the request to change venue"). Movants are not from Oklahoma, they are not asserting any claims against anyone in Oklahoma, they are not asserting any claims against Debtor or the estate of

Debtor and there is no justifiable reason to burden Movants with a transfer to Oklahoma. There is no reason to delay the trial of their cases by transferring venue to Oklahoma. For these reasons Movants urge the Court to deny Debtors Motion to Transfer Venue of their case against non-debtors to Oklahoma.

**G. Notice Under Bankruptcy Rule 9027(e)(3)**

22. Movants deny that this proceeding is a core proceeding.
23. Movants do not consent to entry of final orders or judgment by the bankruptcy judge.

Respectfully submitted,

MALESOVAS LAW FIRM

/s/ John L. Malesovas  
JOHN L. MALESOVAS  
State Bar No. 12857300  
816 Congress, Suite 1265  
Austin, Texas 78701  
Telephone: (512) 708-1777  
Facsimile: (512) 708-1779  
[john@malesovas.com](mailto:john@malesovas.com)

ANTHONY L. VITULLO  
State Bar No. 20595500  
LAURA RICHARDS SHERRY  
State Bar No. 24056203  
FEE, SMITH, SHARP & VITULLO, L.L.P.  
Three Galleria Tower  
13155 Noel Road, Suite 1000  
Dallas, Texas 75240  
Telephone: (972) 934-9100  
Facsimile: (972) 934-9200  
[lvitullo@feesmith.com](mailto:lvitullo@feesmith.com)  
[lscherry@feesmith.com](mailto:lscherry@feesmith.com)

- and -

LARRY E. KELLY  
State Bar No. 11226500  
BEARD KULTGEN BROPHY BOSTWICK DICKSON  
& SQUIRES, LLP  
5400 Bosque Boulevard, Suite 301  
Waco, Texas 76710  
Telephone: (254) 776-5500  
Facsimile: (254) 776-3591  
E-mail:[Kelly@thetexasfirm.com](mailto:Kelly@thetexasfirm.com)

*Counsel for Movants*

**CERTIFICATE OF CONFERENCE**

I hereby certify that prior to filing the foregoing Motion filed by Cottam and Warder, I contacted and conferred with Doug Skierski, counsel for the Debtor in this case. No agreement could be reached regarding this matter at this time.

/s/ John L. Malesovas

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion by Cottam and Warder was served upon the parties listed below by facsimile, regular U.S. Mail, certified mail, return receipt requested and/or electronic service on this 23rd day of June, 2010.

Mr. Peter Franklin  
Mr. Doug Skierski  
Mr. Erin K. Lovall  
Franklin Skierski Lovall Hayward, LLP  
10501 N. Central Expressway, Suite 106  
Dallas, TX 75231

Mr. Gregg S. Weinberg  
Roberts Markel PC  
2800 Post Oak Boulevard, 57th Floor  
Houston, TX 77056

Ms. Katy S. Kamen  
Mr. Ted Scallet  
Groom Law Group  
1701 Pennsylvania Ave., N.W.  
Washington, DC 20006

Mr. James W. Bowen  
 Hunton & Williams, LLP  
 1445 Ross Avenue, Suite 3700  
 Dallas, TX 75202

Mr. Lawrence T. Bowman  
Cozen O'Connor  
1717 Main Street  
2300 Comerica Tower  
Dallas, TX 75201

Ms. Amy B. Boyea  
Edison, McDowell & Hetherington, LLP  
2000 E. Lamar Boulevard, Suite 600  
Arlington, TX 76006

Mr. D. Craig Brinker  
Henslee Schwartz, LLP  
6688 North Central Expressway, Suite 850  
Dallas, TX 75206

Ms. Karan C. Ciotti  
Ogden, Gibson, Broocks, Longoria & Hall, LLP  
1900 Pennzoil South Tower  
711 Louisiana Street  
Houston, TX 77002

Ms. Sarah B. Davis  
Beirne Maynard & Parsons, L.L.P.  
1700 Pacific Avenue, Suite 4400  
Dallas, TX 75202

Mr. Jason K. Fagelman  
Fulbright & Jaworski  
2200 Ross Avenue, Suite 2800  
Dallas, TX 75201

Mr. Juston R. Givens  
Phillips Murrah, P.C.  
101 N. Robinson Avenue, 13th Floor  
Oklahoma City, OK 73102

Mr. Timothy Headley  
Cozen O'Connor  
1717 Main Street  
2300 Comerica Tower  
Dallas, TX 75201

Mr. Stephen C. Jackson  
Maynard Cooper & Gale, PC  
1901 Sixth Avenue North, Suite 2400  
Birmingham, AL 35203

Mr. Dale Ossip Johnson  
The Johnson Firm  
P. O. Box 427  
Cedar Park, TX 78630  
Mr. Gary S. Kessler  
Kessler & Collins  
2100 Ross Avenue, Suite 750  
Dallas, TX 75201

Mr. Fred A. Leibrock  
Phillips Murrah, P.C.  
Corporate Tower, 13th Floor  
101 N. Robinson  
Oklahoma City, OK 73102

Mr. Glenn LeMay  
Gordon & Rees LLP  
1900 West Loop South, Suite 1000  
Houston, TX 77027

Ms. Allison J. Maynard  
Wilson Elser Moskowitz Edelman & Dicker, LLP  
901 Main Street, Suite 4800  
Dallas, TX 75202

Mr. David T. McDowell  
Edison, McDowell & Hetherington, LLP  
3200 Southwest Freeway, Suite 2920  
Houston, TX 77027

Mr. Timothy Muth  
Reinhart Boerner Van Deuren SC  
1000 N. Water Street, Suite 2100  
Milwaukee, WI 53201

Mr. Arthur V. Pearson  
Murphy Pearson Bradley & Feeney  
88 Kearney Street, 10th Floor  
San Francisco, CA 94108

Mr. Matthew G. Pletcher  
Beirne Maynard & Parsons, L.L.P.  
1300 Post Oak Blvd., Suite 2500  
Houston, TX 77056

Mr. Foster Reese  
Ms. Julie A. Shehane  
Mr. Kirk D. Willis  
Helms & Greene, LLC  
1700 Pacific Avenue, Suite 1000  
Dallas, TX 75201

Mr. Bryon L. Romine  
Kessler & Collins  
2100 Ross Avenue, Suite 750  
Dallas, TX 75201

Mr. Martin S. Schexnayder  
Wilson Elser Moskowitz Edelman & Dicker, LLP  
5847 San Felipe, Suite 2300  
Houston, TX 77057

Mr. Joe Sibley  
Camara & Sibley, LLP  
2339 University Blvd.  
Houston, TX 77005

Mr. Nelson Skyler  
Brown Sims, PC  
1177 West Loop South, Tenth Floor  
Houston, TX 77027

Mr. L. Boyd Smith  
Sedgwick, Detert, Moran & Arnold LLP  
1111 Bagby Street, Suite 2300  
Houston, TX 77002

Mr. J. Michael Weston  
Bennett Weston Lajone & Turner PC  
1750 Valley View Lane, Suite 120  
Dallas, TX 75234

/s/ John L. Malesovas